80-1262

No. _____

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

SUPREME OPTICAL COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether employees who are absent from work in order to attend an unemployment compensation hearing for the sole and express purpose of helping a former employee obtain unemployment compensation "to help his family" are thereby engaged in activity for "mutual aid or protection" under Section 7 of the National Labor Relations Act.
2. Whether the standard announced by the National Labor Relations Board that Section 7 protects concerted activities which have merely "some relationship to the employment situation" is a proper interpretation of the Act.
3. Whether the Court of Appeals acted properly in enforcing the Board's order on a basis different from that which was articulated by the Board and its Administrative Law Judge.

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OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported at ____ F.2d ____, 105 L.R.R.M. 3022, and appears in the Appendix at pages 1a-3a. The decision of the Administrative Law Judge of the National Labor Relations Board is reported at 235 NLRB 1432 and appears in the Appendix at pages 4a-27a. The decision and order of the National Labor Relations Board is reported at 235 NLRB 1432 and appears in the Appendix at pages 27a-33a. The judgment of the Sixth Circuit Court of Appeals appears in the Appendix at pages 34a-35a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1980 (Appendix pp. 34a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, reads in pertinent part as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) reads as follows:

> "It shall be an unfair labor practice for an employer --
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in §157 of this title."

STATEMENT OF CASE

This petition seeks review of a final order of the National Labor Relations Board ("Board") wherein the Board determined that the petitioner, Supreme Optical Company,

Inc. ("Company") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) ("Act"). The action held to be unlawful was the Company's discharge of five employees for having absented themselves from work in order to testify at an unemployment compensation hearing to try to help a former employee obtain unemployment compensation benefits "to help his family."[1/] On review pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f), the Sixth Circuit Court of Appeals granted enforcement of the Board's order.

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1. The employees' motivation in attending the unemployment hearing is not in issue. The only evidence before the Board with regard to motivation was the testimony of one of the employees that:

> ". . . we didn't have anything against the Company; . . . we only went to the Unemployment Office to try to help Dale get his unemployment to help his family." (Transcript of hearing before the Board's Administrative Law Judge at p. 184) (Appendix p. 36a)

The circumstances[2/] leading up to the discharge of the five employees began with their leaving work around noon, the beginning of their normal lunch period, on November 30, 1976. Minutes before leaving the plant the employees approached David Carlton and asked for permission to go to an unemployment hearing for former employee Dale Priest. Although the hearing did not commence until 2:00 p.m., and the unemployment office was only about a ten minute drive from the Company's plant, the employees gave as their reasons for leaving at noon that they wanted to eat lunch, clean up, change clothes and try to testify prior to the 2:00 p.m. scheduled hearing time, then return to the plant so as not to miss much work.

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2. The facts recited are as found by the Administrative Law Judge (Appendix pp. 8a-18a). Those findings of fact were undisturbed by the Board.

Carlton advised the group that he would have to ask Foreman Knox, who had the "controlling authority" (Appendix p. 8a). The employees themselves had avoided confronting Knox with their request because they thought he would deny permission to be absent from work to attend the hearing.

Carlton left the employees to search for Knox, but could not locate him. He then told them to go to the hearing and tell the truth.[3/]

The employees arrived at the hearing site around 12:45 p.m., and learned that they would not be able to give testimony

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3. Again, these are the facts as found by the Administrative Law Judge. Throughout the Board proceedings and before the Court of Appeals the Company argued vigorously that Carlton was not a supervisor, had no authority to give the employees permission to be absent from work and did not in fact give such permission. Although the Court of Appeals did not address and rule upon this issue, the Company does not here ask the Court to consider it since there is an overriding issue of law which, if the Court agrees with the Company, renders it moot.

prior to 2:00 p.m. when the hearing was scheduled to start. They then left the hearing site and, rather than eating lunch, browsed around a nearby shopping center until 2:00. They then went to the hearing and testified.

Although the hearing was completed around 2:30, the five employees did not return immediately to work. Whereas the Company's representatives who had attended the hearing had returned to the plant by around 2:50 p.m., the five employees did not return until an hour later, at 3:50 p.m. Their delayed return was due to the fact that following the hearing they waited around and talked to the former employee, Priest, for about fifteen minutes, then went to eat lunch before returning to work.

The five employees were gone for almost four hours in order to attend a half-hour hearing and eat lunch. They constituted fully one-third of the fifteen

employees in the department in which they worked. On the day of the hearing the department was behind in production. To try to meet production needs it was necessary for the Company to bring in employees from other departments, and even the Company's General Manager was forced to go into the department and perform work there.

These were the facts as they existed at the time of the employees' absence. When they finally did return to the plant at 3:50 p.m., they were discharged.

The discharges resulted in the filing of an unfair labor practice charge with the Board, which in turn issued a complaint alleging that the Company had violated Section 8(a)(1) of the Act.

An Administrative Law Judge held that "employee attendance at an unemployment hearing is a protected concerted activity." because "Unemployment compensation benefits as a matter of law are related to employee

wages and working conditions." (Appendix p. 19a, n. 13).

A three-member panel of the Board affirmed the rulings, findings and conclusions of the Administrative Law Judge, setting out additional rationale therefor, and adopted his recommended order. (Appendix pp. 27a-33a) The additional rationale of the Board included the observation that the attendance of the employees at the unemployment compensation hearing, clearly concerted activity, "had some relationship to the employment situation and was protected by the Act." (Appendix p. 31a)

On appeal under Section 10(f) of the Act, the Court of Appeals affirmed.[4/] The Court agreed that there is a "connection between unemployment compensation and employee wages and working conditions" but did not agree with the Administrative Law

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4. Appendix pp. 1a-3a.

Judge and the Board that "attendance at an unemployment hearing is always protected activity." (Appendix p. 2a) In explaining why it held the activities to be protected in this case, the Court below stated:

> The circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer. It is reasonable for employees to be concerned about the consequences of their possible termination. (Appendix pp. 2a-3a)

REASONS FOR GRANTING THE WRIT

I.

The decision of the court below misreads and misapplies statutory and decisional law. An important question of federal labor law has been decided which is in conflict with this Court's decisions in Eastex, Inc. v. National Labor Relations Board, 437 U.S. 556 (1978), and Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). For the first time the Board, affirmed by a

Court of Appeals, has extended the "mutual aid or protection" language of Section 7 of the Act to cover concerted activities directed toward a subject matter, unemployment compensation for a former employee, which falls outside the scope of terms or conditions of employment.

Neither the Board nor its Administrative Law Judge cited any authority for holding employees' attendance at an unemployment compensation hearing to try to help a former employee obtain unemployment compensation "to help his family" to be protected under the Act. The Administrative Law Judge's reasoning was that unemployment compensation benefits "as a matter of law are related to employee wages and working conditions." (Appendix p. 19a, n. 13) To this the Board added its own observation that an unemployment compensation hearing has "some relationship to the employment situation." (Appendix p. 31a)

Neither of these attempts to tie unemployment compensation hearings or benefits to "terms and conditions of employment," so as to bring the actions of the five employees within the ambit of the "mutual aid or protection" clause, withstand close scrutiny.

It cannot be gainsaid that the touchstone for protected activities is whether those activities are directed toward, or are reasonably related to, terms and conditions of employment. While it is not necessary that employees be acting with respect to their interests vis-a-vis their own employer, e.g., Eastex, Inc. v. NLRB, supra, at 564, the interests toward which the activity is directed must be those of employees qua employees. The Board itself has repeatedly recognized this maxim.

> The leaflet does not in any respect involve interests of employees qua employees, and . . . [therefore] the matter is outside the coverage of Section 7. Great Lakes Steel, 236 NLRB 1033-34 (1978).

In Jewel Companies, 245 NLRB No. 176 (1979),[5/] the Board held that an employee attempting to establish a credit union was not engaged in activity protected by Section 7. In so holding, the Board noted that:

> . . . we rely wholly on [the fact] that the credit union which the Charging Party was attempting to establish was not within the scope of the employment relationship existing between Respondent and its employees, and that, therefore, his conduct in that regard was not protected by Section 7 of the Act. (slip opinion at pp. 1-2, n. 2)

See, also, Wickes Lumber, 245 NLRB No. 7 (1979); Firestone Steel Products Co., 244 NLRB No. 148 (1979); Ford Motor Co., 221 NLRB 663 (1975), enf'd 546 F.2d 418 (3rd Cir. 1976).

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5. Enf'd sub nom. Keosaian v. NLRB, ___ F.2d ___, 105 L.R.R.M. 2516 (1st Cir. 1980). The First Circuit affirmed on the basis of a rationale different from that of the Board.

The Sixth Circuit itself has stated that "When employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7." NLRB v. Leslie Metal Arts Co., Inc., 509 F.2d 811, 813 (6th Cir. 1975).

This Court, in holding that employees who passed out handbills disparaging their employer were not engaged in activity protected by the Act, relied on the fact that:

> Their attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. NLRB v. Local 1229, IBEW, 346 U.S. 464, 476 (1953).

In its most recent decision in this area, Eastex, Inc. v. NLRB, supra, this Court held employee distribution of literature to be protected. The subjects which the distributed materials addressed, minimum wage laws and union security ("right-to-work"), were held to be sufficiently related to employees' interests to render

the distribution protected under the "mutual aid or protection" clause. Even though the handbills were directed toward legislation, the subjects of the legislation, wages and union membership, constituted terms or conditions of employment about which the employees, as employees, were legitimately concerned.

The same cannot be said for unemployment compensation benefits for a former employee "to help his family." As this Court noted in Eastex:

> . . . some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause. 437 U.S. at 567-68. (Emphasis supplied)

That point of attenuation has been exceeded in this case. The Board's rationale that an unemployment hearing has "some relationship to the employment situation" is

not a proper substitute for this Court's test in Eastex, to wit "relationship to employees' interests as employees."

The employees in this case had no interest as employees in whether or not the former employee, Dale Priest, was awarded unemployment compensation. This was not a case where there was a question surrounding the circumstances of Priest's discharge which might have affected the five employees interests as employees. The following facts, alone, are established by the record: Priest was discharged. He sought unemployment compensation. The five employees appeared at the unemployment compensation hearing to try to help him get his unemployment to help his family. No other motivation was expressed or implied by the facts in the record.

The Board's standard of "some relationship to the employment situation" could be applied, for example, to employees who

acted in concert to help another employee (not necessarily of their own employer) to obtain food stamps because his earnings from employment were low. The "low earnings" of the one employee would have "some relationship to the employment situation," but the pursuit of food stamps would have no bearing upon the employees' interests as employees. Such activities would not be protected by Section 7. The Board must be required to follow this Court's standard as established in Eastex, and when measured by that standard the actions of the employees in this case were not protected by Section 7.

II.

In order to be protected by the Act, concerted activities must be for "mutual aid or protection."

In this case the Board acknowledged that Priest, the individual to whom the five employees lent their support, was not

an employee. "[T]he one being helped was no longer an employee and hence could not be in a position to reciprocate to the five attending the hearing on his behalf . . .." (Appendix p. 31a) Nor was Priest's concern, unemployment compensation, a term or condition of employment.

Where the "mutuality" is between employees and non-employees, Section 7 does not lend its protections.

> . . . so far as the resolution was a 'concerted activity' for the 'mutual aid or protection' of the [non-employee] farmers on the one hand and the [employees] on the other, [Section 7 of the Act] did not cover it. NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2nd Cir. 1942).

Since the activities in question thus were not in support of other employees, then it next must be determined whether they were reasonably related to their own terms and conditions of employment. They were not, for two reasons. First, the

employees' express motivation was otherwise.

> "[We] didn't have anything against the Company; . . . we only went to the Unemployment Office to try to help Dale get his unemployment to help his family." (Appendix p. 36a)

Second, even if they had been considering their own interests, i.e., the possibility that someday they themselves might wish assistance in seeking unemployment compensation, such interests are not reasonably related to their terms and conditions of employment.

Even if it is assumed that attendance at an unemployment compensation hearing may amount to action for "mutual aid or protection" under circumstances where employees in fact are motivated by their own interests as employees, that was not the case here. Unlike the employees who had been discharged

for attending an unemployment hearing in Painter Tool, Inc., 235 NLRB 1468 (1978), enf'd without published opinion, 103 L.R.R.M. 2603 (3rd Cir. 1980), the employees in this case had no stake in the outcome. In Painter Tool the Board made findings of fact which clearly demonstrated the interests of the employees there as employees:

> [T]he employees who attended the unemployment hearing had a stake in Thornton's charge made against the Painters, for the assertion that Roger Painter had violated governmental specifications and Respondent's quality control system, at least arguably, was in conflict with the definition of employee responsibilities, as contained in a document which they were required to sign as a condition of employment. Since the employees acted in pursuit of the principle that they not be rendered vulnerable to legal penalties as a result of intervention by members of the Painter family, under conditions requiring violation of their stipulations to the Federal Government, those offering testimony at the Thornton hearing were clearly engaged in protected activity within the meaning of Section 7 of the Act. 235 N.L.R.B. 1471-72 (emphasis added).

The employees in the present case went to the hearing only to try to help the former employee and his family. Motivation is a crucial consideration.

For example, in the case of honoring picket lines of employees of other employers (an example referred to by the Board in its decision), employees are protected when they are making common cause with the picketing employees, or acting out of principle. However, when they refuse to cross those same picket lines for purely personal reasons, such as fear of harm, then their activities are not protected under the Act. Plain Dealer Publishing Co. v. Cleveland Typographical Union #53, 520 F.2d 1220, 1228 (6th Cir. 1975), cert. denied, 428 U.S. 909 (1976); NLRB v. Union Carbide Corp., 440 F.2d 54 (4th Cir. 1971), cert. denied, 404 U.S. 826 (1971).

"[A]bsence from work because of personal reasons . . . is not protected

activity, and had the Company chosen to terminate these individuals, nothing in the National Labor Relations Act would have prevented it from doing so." Lodges 743 and 1746, IAM v. United Aircraft Corp., 534 F.2d 422, 445, n. 39 (2nd Cir. 1975), cert. denied, 429 U.S. 825 (1976). The absence of the five employees in question was for the purely personal reason of wanting to help a former employee obtain unemployment compensation "to help his family."

In Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., supra, this Court held that neither are retirees "employees" within the meaning of the Act, nor is the subject of benefits for retirees vitally related to employees' terms and conditions of employment. The Court noted that connection between benefits for retirees and employees' own terms and conditions is "speculative and insubstantial at best." 404 U.S. at 180.

In the same way, Dale Priest was not an employee within the meaning of the Act, and the connection between unemployment compensation benefits and employees' interests as employees is far more "speculative and insubstantial." Hence, the Board ignored the teaching of this Court in Pittsburgh Plate Glass, and transgressed the standard set forth in Eastex, in holding the actions of the five employees in this case to be protected under Section 7 of the Act.

III.

The court below rejected the Board's reasoning that attendance at an unemployment compensation hearing is always activity entitled to the protection of Section 7. At that point the court's analysis should have stopped, and enforcement should have been denied. However, the court proceeded to supply reasons of its own for holding the activity in this case to be protected.

> The circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer. It is reasonable for employees to be concerned about the consequences of their possible termination. (Appendix pp. 2a-3a)

This is rank speculation on the part of the court as to the employees' motivation for attending the hearing. There is nothing in the Board's decision, or the record of the proceedings before the Board, from which the court could have inferred that the employees who attended the hearing had any concern about the circumstances of Priest's termination or about the "consequences of their possible termination." Not even the Board engages in speculation of this order to support findings of violations of the Act. For example, in Scioto Coca-Cola Bottling Co., 251 NLRB No. 105 (1980), the Board held that no violation of the Act could be found:

> [I]n order for the Board to make [a finding of a Section 8(a)(1)

> violation] there must be some evidence on the record from whatever source that the activity engaged in was not only concerted but, more significantly, that it was in fact protected by Section 7 of the Act. Here there is absolutely no record evidence from either the employees or Respondent as to why the employees left work on September 1. It could have been, as the Administrative Law Judge speculates, because they were dissatisfied with bargaining. On the other hand it could just as well have been because they wanted to start the Labor Day holiday early, which would not be protected by the Act. (slip opinion at p. 4).

In the present case it is not necessary to speculate on the five employees' motivation. It is not in dispute. They went to the hearing only to try to help a former employee obtain unemployment compensation to help his family.

For the above reasons alone the decision of the Court of Appeals should be reversed. However, there is yet another reason for reversal. As already noted, the court rejected the Board's view that

attendance at an unemployment hearing is always protected under Section 7. The court then substituted its own rationale. This it may not do.

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).
>
> [A]n agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself . . . Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 169 (1962).

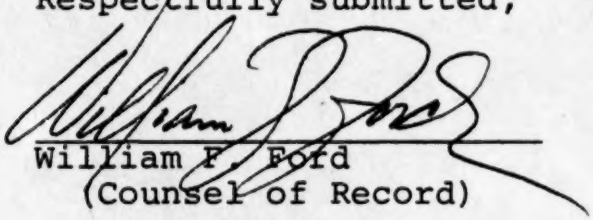
See, also, NLRB v. Pipefitters Local 638, 429 U.S. 507, 522 (1977); SEC v. Chenery Corp., 318 U.S. 80 (1943).

CONCLUSION

The decision of the Sixth Circuit is in conflict with decisions of this Court. An important question of federal labor law has been decided erroneously, and should be settled by this Court. A definitive resolution of the scope of the "mutual aid or protection" provision of Section 7 of the Act as it relates to activities related to the interests of employees as employees is important to the orderly and proper administration of the National Labor Relations Act. The court below, once rejecting the Board's rationale for its holding, should have denied enforcement to the Board's order rather than supplying its own rationale and

granting enforcement. For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



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No. 78-1259

UNITED STATES COURT OF APPEALS

SUPREME OPTICAL COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON APPEAL from the National Labor Relations Board.

Decided and Filed October 27, 1980.

Before: MARTIN and JONES, Circuit Judges; DUNCAN, District Judge.*

PER CURIAM. This case is before the Court on Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board, 235 N.L.R.B. No. 193, dated May 5, 1978. In its Decision and Order, the Board held that in attending an unemployment compensation hearing at the request of a former employee, five of the Company's employees were engaged in concerted activity protected by the National Labor Relations Act, as amended. Consequently the Board held the Company violated Section 8(a)(1) of the Act by discharging those employees because of their actions.

The Board, in the course of its Decision, also found that David Carlton was a supervisor within the meaning of Section

* Honorable Robert M. Duncan, United States District Court for the Southern District of Ohio, sitting by designation.

2(11) of the Act, and that he had given the employees in question permission to leave work to attend the hearing. Had the employees not had permission, the Board indicated, the same result might not necessarily have been reached, since in that case it would have been necessary to balance the employees' interest in engaging in the activity against the Company's interest in efficient operation of its business.

The Company contends that the Board erred as a matter of law in holding the employees' attendance at an unemployment compensation hearing protected under the Act.

The Board urges us to follow the decision in *Painter Tool, Inc.*, 235 N.L.R.B. 1468 (1979), *aff'd without opinion*, 103 LRRM 2603 (3rd Cir. 1979), holding attendance by employees at a compensation hearing protected activity under Section 7 of the National Labor Relations Act. We held in *Vic Tanny International, Inc.* v. *N.L.R.B.*, 622 F.2d 237 (6th Cir. 1980), that Section 7 of the Act was intended to protect not only concerted activity of union members but also concerted activity of the same nature engaged in by unorganized employees.

The Administrative Law Judge found that permission to attend the hearing was granted the employees by a supervisor and attendance at the hearing in this case amounted to protected concerted activity.

While we agree with the Administrative Law Judge that there is a connection between unemployment compensation and employee wages and working conditions, we do not believe that the attendance at an unemployment compensation hearing is always protected activity. We hold here that the employees' attendance at an unemployment compensation hearing had a sufficiently close nexus to the terms and conditions of employment to be "protected concerted activity." The circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer. It is reasonable for employees to be con-

cerned about the consequences of their possible termination. Two factors militate in favor of such a finding in the instant case. First, the employees were given permission, thus placing no burden upon the employer. Second, the Administrative Law Judge found that the Company's rationale for discharge was pretextual. The employer is not entitled to permit union members to engage in protected activity and then penalize employees for doing so. Thus, if an employee is given time off in order to attend a union meeting, the employer cannot fire the employees because they were not at work. We believe there is substantial evidence on the whole record to support the Board's conclusions.

The order of the Board will be ENFORCED.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 9-CA-11023

In the Matter of

SUPREME OPTICAL COMPANY, Inc.

and

TEAMSTERS LOCAL UNION NO. 957, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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Mr. Dick Loy, Dayton, OH
for the Charging Party-Union

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for the Respondent-Employer.

DECISION

(Filed August 3, 1977)

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on May 17, 1977, at Dayton, Ohio.

The charge was filed on February 3, 1977. The complaint in this matter was issued on February 25, 1977. The issues concern whether the Respondent has violated Sec-

tion 8(a)(1) of the Act by discharging five employees because they engaged in protected concerted activities within the meaning of the Act.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the Respondent and the General Counsel and have been considered.[1]

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer

The facts herein are based upon the pleadings and admissions therein.

Supreme Optical Company, Inc., the Respondent, an Ohio corporation, is engaged in the manufacture of optical products at its Franklin, Ohio, facility. During a 12 month representative period, Respondent purchased and received goods and materials valued in excess of $50,000, which

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1. On July 15, 1977, Respondent filed a motion to strike the General Counsel's brief as constituting an unwarranted attack on Respondent's counsel as injecting new issues, and as referring to matter not of record. Considering all of the premises, I find that consideration of the issues and arguments of counsel warrants a denial of such motion upon the basis that the trier of fact, without a jury, ignores overstatements or arguments not supported by evidence. The General Counsel's descriptive terminology, of what Respondent's pleadings were tantamount to, is ignored and considered to be an overstatement. Respondent's initial pleadings, however, do not appear to comport with the requirements of the Board's Rules and Regulations, Section 102.20 and 102.21 considered as a whole. Respondent's counsel should govern himself accordingly as regard future pleadings. As to the "new issues" argument, it was made clear at the trial that the issues would be those as alleged. "New issues" as regards the theory of the alleged discharges simply have not been litigated and are not considered as new issues. "New issues" as regards "new remedy" are not new issues in such sense and are proper for consideration in the remedy aspects of the case.

were shipped directly to its Franklin, Ohio, facility from points outside the State of Ohio.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved[2]

Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Preliminary Issues*
Supervisory Status[3]

At all times material herein, the following named persons were employed by the Respondent in the positions set opposite their respective names and are and have been agents of Respondent, acting on its behalf, and supervisors within the meaning of Section 2(11) of the Act.

Dan Knox — Foreman
Dave Carlton — Supervisor

As indicated, I find that the credited aspects of the testimony of witnesses Carlton, Rhoades, Blankenship, and

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2. The facts are based upon stipulations by the parties and the pleadings and admissions therein as amended at the trial.

3. The facts relating to Knox's status are based upon stipulations by the parties made at the trial. The facts relating to Carlton's status are based upon a composite of the credited aspects of the testimony of Carlton, Rhoades, Blankenship, and Keller.

Keller establish that Dave Carlton was a supervisor within the meaning of Section 2(11) of the Act.

The issue is whether Carlton is a leadman without supervisory authority or a supervisor with supervisory authority within the meaning of Section 2(11) of the Act. Carlton's credited testimony reveals that he drifted into a position of leadman or of a supervisory type position by assuming more duties and responsibilities and that his Foreman, Knox, used him more and more in such capacity commencing about a year before the incident involved in this proceeding.

There is no evidence or contention that Carlton hired or fired, recommended hiring or firing, or had any attribute of supervisory authority excepting in responsible direction of work and in transferring employees from one job to another in the department or area where he worked. The facts are clear that, during the time immediately preceding the crucial events in this proceeding, Carlton directed the work of employees as to technical matter relating to work on lenses, etc. The facts are also clear that he exercised independent judgment in transferring employees from one job to another in his area of responsibility. These facts alone are sufficient to establish that Carlton is and was a supervisor and agent within the meaning of Section 2(11) of the Act.

The facts are clear that around November 12, 1976, the employees, in the department where Carlton worked, were assembled and told in effect that Carlton would be taking over as supervisor for the department, and that Foreman Knox would be going on the road as a salesman. Following this, it is clear that Carlton and Knox during the next several weeks discussed jobs and problems relating to Carlton's proposed place of operations. It is disputed as to whether Knox was absent a great deal between

November 12 and November 30, 1976. It is not necessary to resolve such dispute, however. It is clear that the employees considered that as long as Knox was there, he had greater and more controlling authority than Carlton.

Considering all of the foregoing, it is clear and I conclude and find that Carlton was a supervisor and agent of the Respondent within the meaning of Section 2(11) of the Act.

B. *Events of November 30, 1976*

The General Counsel alleges that "on or about November 30, 1976, pursuant to permission granted by Respondent, to leave work, the following named employees appeared at a hearing before the Ohio Bureau of Unemployment Services to testify on behalf of an employee whose employment had been terminated by Respondent."

Virginia Asbury
Gerea Blankenship
Carolyn Hale
Nancy Kellar
Judy Rhoades

Statements at the trial narrowing issues reveal that the facts as alleged are only disputed as to the question of whether the named employees had received permission to leave work to attend said hearing.

The Facts[4]

1. On November 30, 1976, there was a scheduled hearing before the Ohio Bureau of Unemployment Services

4. The facts are based upon a composite of the credited aspects of the testimony of Carlton, Rhoades, Blankenship, Kellar, Hale, and Hollenkamp. Based upon a consideration of the logical consistency of all facts, I discredit the testimony of any witness inconsistent with the facts found.

concerning a former employee of the Respondent named Dale Priest. This hearing was scheduled for 2 p.m. and all of the employees involved in this proceeding knew that the hearing was scheduled for 2 p.m. Prior to November 30, 1976, Dale Priest had asked Asbury, Blankenship, Hale, Kellar, and Rhoades to come to the unemployment hearing and to testify. The employees, however, had not been subpoenaed as witnesses for the hearing.

2. On the morning of November 30, 1976, before starting work, Asbury, Blankenship, Hale, Keller, and Rhoades discussed the question of whether to go to the unemployment hearing that afternoon and as to what they should do about receiving permission to go or not. The employees decided to postpone final decision until lunchtime and that Rhoades would act as spokesman if permission were to be sought.[5]

Foreman Knox was at work on the morning of November 30, 1976, and worked in close association at times with some of the five employees who later went to the unemployment hearing concerning Priest. None of the five employees spoke to Knox about possible attendance at the 2 p.m. unemployment hearing.

Around noontime Asbury, Blankenship, Keller, Hale, and Rhoades met at the time clock and decided in finality that they would attend the unemployment hearing that afternoon. Rhoades and Blankenship proceeded to locate

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5. Some of the cross-examination of Rhoades and others was directed toward establishing that the employees had decided early in the morning to go to the hearing and that the employees were trying to avoid seeking permission from Knox. Considering all of the facts, and the logical consistency of facts, I am persuaded that the employees truthfully testified to the effect that their decision to go was not finally made until noontime. Despite this, it is clear that the decisional thinking was close to sureness early in the morning. It is also apparent that part of the uncertainty that remained was a reluctance to have a confrontation with Knox.

Supervisor Carlton. Hale and Asbury followed close behind as a part of the group. Keller did not follow as part of the initial group.

Rhoades spoke to Carlton and asked for permission for the group to go to the unemployment hearing. Carlton asked Rhoades how many were going. Rhoades told Carlton that there were five who wanted to go. Carlton asked Rhoades if they had spoken to Foreman Knox. Rhoades replied that no one had spoken to Knox. Carlton stated that he had better ask Knox. Rhoades asked Carlton in effect why Knox had to be asked. Rhoades asked Carlton if he (Carlton) weren't the boss. Carlton replied that he was, but that if Knox were there, he had better ask him about the matter.

Carlton left and looked for Knox. Carlton was unable to locate Knox and returned to the group in a few minutes. Carlton reported that he had been unable to locate Knox. The conversation occurred as the group had commenced moving toward the exit door. By this time Keller had joined the group. Keller told Carlton that she had left Foreman Knox in the lens room. Carlton told Keller that he had been there but had not seen Knox.

Carlton asked Rhoades if Asbury, Hale, Keller, Blankenship and she were the five who were going to the hearing. Rhoades replied that they were the ones.

Carlton asked Rhoades when they were planning to go. Rhoades indicated that they were planning to go during the lunch break, to testify during the lunch break, and return so as to not miss much work. Carlton asked why they couldn't wait until Knox showed up. Rhoades replied that they had to go to lunch before going to the hearing. Carlton asked why they couldn't go to lunch, return, and see Knox around 1 p.m. before leaving.

Rhoades told Carlton that they needed to go during lunchtime so they could have lunch, clean up, and change.[6] Carlton asked Rhoades why they had to do this. Rhoades replied that they were dirty and needed to clean up for the hearing. Carlton told the employees that the hearing was not conducted in a formal manner, that there might be only one but could be three hearings, that if there were three hearings, he would have to testify. Rhoades continued to indicate that the employees needed to clean up and change.

Carlton asked Rhoades if the Board had subpenaed her to testify. Rhoades told Carlton that they had not been subpenaed, that they probably could have been subpenaed, that Priest had asked them to come and testify, and that she was afraid (in the nature of belief) that they would be subpenaed if they did not attend the hearing.

Carlton told the employees to go to the hearing and tell the truth. Carlton asked the employees if they were going to return to work and was told that they were.[7]

3. A few minutes after the five employees had left Respondent's premises to go to the unemployment hearing, Carlton saw Foreman Knox in President Young's office. Present with Young and Knox was General Manager Jenkins. Carlton reported that the five employees had left to go to lunch and the unemployment hearing. Carlton was asked to tell Young and Knox what was going on,

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6. Carlton testified to the effect that Rhoades spoke about changing clothes. The former employees testified that Rhoades spoke about changing shoes. Considering the total facts of what occurred, I am persuaded that Rhoades spoke about "changes" but not specifically about shoes or clothes. I discredit the testimony of any witness inconsistent with the facts found.

7. It is noted that the normal lunch hour was from 12 noon to 12:45 p.m.

what had happened. Carlton related to Young and Knox his version of what had happened. Carlton related in effect that the Board had requested the employees to come to testify and that he had given them permission to go during their lunch period, to testify, and to return as soon as they could after the hearing.[8]

4. Young became upset at what Carlton had reported. Young telephoned his attorney, Hollenkamp, between 12:15 and 12:30 p.m. Young asked attorney Hollenkamp whether he had to permit five employees to have time off to go to an unemployment hearing. Hollenkamp told Young that he couldn't answer the question unless he had the facts.

Hollenkamp asked questions, and Young set forth answers thereto as to what he considered to be the facts. In such discussion as ensued, Young related that the employees had been subpenaed. Hollenkamp indicated that this was a matter that needed to be checked. Young indicated that the employees had left and would not be returning, that the matter could not be checked with them at the time. Hollenkamp asked to speak to Grollemund who was going to attend the hearing. Hollenkamp asked Grollemund to check to see if the employees had been subpenaed. In the discussion between Hollenkamp and

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8. Carlton was the only witness to testify as regards this conversation with Knox and Young. His testimony was basically conclusionary and general. Considering all of the facts, Hollenkamp's testimony that Young related that the employees had been supoenaed, Carlton's testimony relating to the effect that he was told that the Board had requested the employees to testify, Carlton's testimony both denying and indicating a permission to employees to go to lunch when obviously such permission is not necessary, and all of the facts, I am persuaded that Carlton told Young and Knox that the employees had told him that their testimony had been requested by the Board and that he had given permission to go because the employees were going to go during their lunchtime and return after the hearing.

Young, Young stated that the employees constituted a third of his busiest department and that this would cause him problems. Young continued to press Hollenkamp for an answer as to whether he had to permit the employees to attend the hearing. Hollenkamp told Young that he needed other facts, that he would come to the Company after lunch.

5. The five employees (Asbury, Blankenship, Hale, Keller, and Rhoades) left Respondent's premises around 12:15, and proceeded to a service station, stopped, cleaned up, and some of the employees changed shoes. The employees then proceeded from the service station to the site (in Middleton) for the unemployment hearing for Dale Priest. The employees arrived at said hearing site around 12:45 p.m.

At the hearing site the employees waited until around 1 p.m. and saw the person (a Mrs. South) who was assigned to conduct the unemployment hearing concerning Priest. The employees inquired as to whether they could give testimony concerning Priest at that time. Mrs. South informed them in effect that their testimony could not be given at that time because the parties were not there, that their testimony would have to be given after 2 p.m.[9] when the hearing was scheduled and when the parties would be present. Mrs. South suggested that they could spend the time between 1 p.m. and 2 p.m., browsing around in a nearby shopping center. The employees followed Mrs. South's suggestion and browsed around the nearby shopping center until around 2 p.m. Prior to 2 p.m. the employees returned to the hearing site.

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9. It is clear that the employees knew that the hearing was scheduled for 2 p.m. Despite this, I am persuaded that the employees mistakenly hoped or believed that they might give testimony prior to the scheduled time in the matter involved.

The unemployment hearing for Dale Priest was conducted on November 30, 1976, commencing around 2 p.m. and concluding around 2:30 p.m. The five employees (Asbury, Blankenship, Keller, Hale, and Rhoades) gave testimony in such proceeding. Present at such proceeding was Priest; present for the company at the proceeding were Foreman Knox and Controller Grollemund. The five employees apparently finished their testimony a short time before the hearing concluded, stepped outside of the hearing room for a few seconds, waited until the conclusion of the hearing, and talked to Priest for about 15 minutes after the hearing was concluded. At no time before, during, or after, the proceeding did Knox or Grollemund speak to the five employees and allude to their being present without permission or allude to an urgent production need for arrangements for their immediate return to Respondent's premises for work.

The five employees (Asbury, Hale, Keller, Blankenship, and Rhoades) left the hearing site around 2:45 p.m., had lunch, and returned to Respondent's premises around 3:50 p.m. At such time, the employees discovered that their timecards had been pulled and were not in the timecard rack.

6. Attorney Hollenkamp arrived at the Respondent's premises around 1:30 p.m. Hollenkamp and Young then had a discussion about the events concerning the employees' (Asbury, Blankenship, Hale, Keller, and Rhoades) attendance at the unemployment hearing. Carlton was then called into the office around 2 or 2:30 p.m. Present in the office at this time were Hollenkamp, Young, Jenkins and Carlton. There then proceeded to be a combination of questioning and discussion mainly centered on questioning of Carlton by Hollenkamp. It is clear that the questioning and discussion centered around what had

transpired between Carlton and the employees as regards conversation and reasons for the employees leaving work and the purpose of their attendance at the unemployment hearing.

Carlton was asked what he thought should be done. At this point, some reference was made to the fact that the company had received a request for representation by the Union on the day before. Carlton expressed his opinion that he had mixed feelings, that he didn't want the Company to be hurt by the giving of testimony by the employees at the unemployment hearing, that, however, he thought they should have a chance to explain the situation.

Later, around 2:50 p.m., Grollemund and Knox returned to Respondent's premises from the unemployment hearing. Further discussion ensued, apparently between Young, Knox, Jenkins, Grollemund and Hollenkamp, concerning the employees' leaving work and attending the unemployment hearing. Young, apparently around 3:30 p.m., decided to discharge the five employees (Asbury, Blankenship, Hale, Keller, and Rhoades).

Apparently, around 3:30 p.m., President Young instructed someone to pull the employees' (Asbury, Blankenship, Hale, Keller, and Rhoades) timecards. Young then apparently instructed Foreman Knox to see that the timecards had been pulled and to inform the employees that they had been discharged. Young further stated that he wanted to know when the employees returned from the unemployment hearing.

7. As has been previously set forth, the five employees (Asbury, Blankenship, Hale, Keller, and Rhoades) returned to Respondent's premises at 3:50 p.m. and discovered that their timecards had been pulled.

Around this time someone informed President Young that the five employees were back. President Young then called General Manager Jenkins and told him to be present with Foreman Knox when Knox told the employees that they were discharged.

The five employees (Asbury, Blankenship, Hale, Keller, and Rhoades), after seeing that their timecards were pulled, were told by several fellow employees that the timecards had been pulled earlier.[10] The five employees then proceeded toward the exit from the building. Around this time General Manager Jenkins and Supervisor Carlton were in the vicinity of the five employees. Jenkins told the employees that Foreman Knox wanted to see the employees in his office, one at a time. Carlton also apparently reiterated the same message to one or more of the employees.[11]

Blankenship told Jenkins that the employees were all in the matter together. At this point Asbury, Blankenship, Hale, and Rhoades proceeded into Knox's office. At this point Knox and Jenkins were in the office with the four named employees.

Foreman Knox told the four named employees that they had let him down, that the employer had had to pull people from other jobs to do their work. Knox asked Rhoades why she hadn't asked him for permission.

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10. Rhoades, as an example, testified that two of the employees told her that the timecards had been pulled shortly before 2 p.m. by President Young. As to establishing when the timecards were pulled, such testimony is hearsay. The General Counsel did not put any witnesses on who could testify of their own knowledge as to when the timecards were pulled. However, it is clear that the timecards had been pulled by 3:50 p.m.

11. For practical purposes, it may be said that all five employees were together when they noted that their timecards were missing. The facts indicate, however, that Keller may have been a little behind the others as the events ensued.

Rhoades told Knox that she had thought that he would try to stop them (from attending the unemployment hearing). Rhoades told Knox that he had refused to let Nancy Keller have time off concerning having her daughter reinstated in school. Knox stated that as to this, Nancy Keller had changed her mind. Foreman Knox stated that he had no alternative except to discharge the employees. Before Knox made this last statement, Keller had joined the other employees in the room. Knox stated that the reason for the discharges was because the employees had not had permission to leave work to go to the unemployment hearing. Jenkins made a similar statement. Blankenship told Knox and Jenkins that the employees had had permission, that they should get Carlton into the meeting. Blankenship started to the door for the apparent purpose of getting Carlton to come into the room. General Manager Jenkins was between Blankenship and the door, and Blankenship construed that Jenkins was blocking her exit and keeping her from going out the door. Blankenship motioned to Carlton, who was on the outside, to come into the office. Foreman Knox also motioned to Carlton to come into the office. Following this, Carlton entered the office.

General Manager Jenkins asked Carlton if he had given permission to the employees to leave and go to the hearing. Carlton replied that all he had done was to give the employees permission to go to lunch. Keller told Jenkins that Carlton had given them permission. Keller and Blankenship asked Carlton in effect to tell them when they ever had to have permission to go to lunch. Carlton replied that Rhoades had told him that they had been officially requested to attend the unemployment hearing, that he had no recourse, that he couldn't have physically stood in their way. Rhoades then stated in effect that she had not told Carlton that the employees had been officially

requested to go to the hearing. Jenkins told Carlton in effect that he wasn't needed any longer, that he should leave.

Jenkins then told the five employees that nothing more needed to be said, that the Labor Relations Board couldn't help them now.[12] Hale told Foreman Knox that the employees had nothing against him or the company, that they had gone to the hearing to help Priest get his unemployment pay. The employees then left the office.

After leaving the office, Hale and Blankenship went back toward their work tables to get some belongings. General Manager Jenkins appeared nearby and told Hale in effect to leave the building immediately.

8. The department in which the five employees (Asbury, Blankenship, Hale, Keller and Rhoades) worked had a total of approximately 15 employees. On November 30, 1976, the department was behind in production. An attempt was made on the afternoon of November 30, 1976, to meet production needs by bringing in some employees from other departments and by some work performed in the department by General Manager Jenkins.

C. *Contentions*

Conclusions

The General Counsel alleges and contends that the five employees (Asbury, Blankenship, Hale, Keller, and Rhoades) had permission to attend an unemployment hearing on November 30, 1976, engaged in protected concerted activity by attendance at such unemployment hearing, and that the Respondent violated Section 8(a)(1) of the Act

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12. The record reveals that an NLRB representation petition had been filed a day or two before and that the matter was one of common knowledge.

by discharging such employees because they engaged in protected concerted activity. The Respondent denies that the employees had permission to attend such unemployment hearing, and denies that the discharge of the employees was because they engaged in protected concerted activity. Rather, the Respondent contends (1) that the discharges were justified because the employees did not have permission to leave work and attend the unemployment hearing, (2) that the employees' leaving work without permission created a production problem justifying their discharges, and (3) that attendance at the unemployment hearing was not protected concerted activity.

Considering all of the facts, I am persuaded and conclude that the facts reveal that the Respondent had given permission for the employees to leave or be absent from work to attend the unemployment hearing on November 30, 1976, that the employees' attendance at such hearing constituted protected concerted activity,[13] and that the discharges of the employees were because of their engaging in protected concerted activities, and that Respondent's production problems were not of such a nature as to out-

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13. The Respondent contends that employee attendance at the unemployment hearing, to testify concerning the receipt of unemployment compensation for a discharged employee, does not constitute protected concerted activity. Thus, the Respondent contends in effect that the employees' own wages and working conditions are not affected. I reject such contention. Unemployment compensation benefits as a matter of law are related to employee wages and working conditions. If an employee is terminated or laid off, such employee is entitled to benefits of an insurance nature, depending upon whether the termination or layoff is for cause or not. All employees in effect have such benefit type insurance coverage. A major protection for employees to see that their own unemployment benefits insurance is meaningful is the willingness of fellow employees to be available to testify as to the relevant issues. An employee who testifies for a discharged employee as to such issues is in effect testifying in general support and protection of his or her own potential benefits and encouraging other employees to be potential witnesses. Thus, I find it clear that employee attendance at an unemployment hearing is a protected concerted activity.

weigh the necessary accomodation of conflicting rights involving the employees' right to engage in protected concerted activity, and that such alleged economic reasons were not the dominating reason for the discharges. It follows that the Respondent's discharges of Asbury, Hale, Blankenship, Keller, and Rhoades, on November 30, 1976, because they engaged in protected concerted activity, constituted conduct violative of Section 8(a)(1) of the Act.

In connection with and as a part of the following consideration I note the following.

1. The facts are clear that the Respondent, by Supervisor Carlton, granted the employees permission to be away from work and to attend the unemployment hearing. Carlton's remarks to Young and Knox, and Attorney Hollenkamp, and later to the employees, Jenkins, and Knox, and in his testimony at the trial, clearly reveal that the employees' testimony concerning the granting of permission was truthful. Thus, Carlton, in effect, when confronted by his superiors, and at the trial, attempted to convey that he only gave the employees permission to go to lunch, that he couldn't help doing what he did. His very testimony makes it clear that he had given permission. It is clear that permission was not needed by the employees to go to lunch. I am persuaded that Carlton, after awareness of President Young's unhappiness over the employees' attendance at the unemployment hearing, attempted to minimize the effect of what he had done and to justify the same. In sum, it is clear that the employees had permission to be away from work and attend the unemployment hearing.

2. It is clear that President Young was unhappy over the employees' planned attendance at the unemployment hearing and so communicated to Attorney Hollenkamp that he was displeased and was seeking advice or rational-

ization for a basis to discharge the employees for attendance at the unemployment hearing.

3. The contended economic justification because of production problems does not stand up under scrutiny. If the Respondent had such production problems or was really concerned on that basis and was not engaged in a search for a pretextuous reason for discharge, Foreman Knox would have communicated such problem to the five employees at the time of the unemployment hearing, and arrangements would have been made to minimize the time lost in attendance at the hearing.

Considering Carlton's and Hollenkamp's testimony of what Carlton reported, it is obvious that President Young would be aware that permission had been granted and that Carlton was minimizing and justifying his actions. In sum, the facts completely persuade that President Young was aware that Carlton had granted the employees permission to be away from work and to attend the unemployment hearing.

4. The conversation between President Young and Attorney Hollenkamp clearly reveals that President Young was angry. If production were the real concern, it would appear that the employees' services would have been utilized for the remainder of the day on November 30, 1976, after they returned from the hearing.

In sum, the preponderance of the facts reveals that the Respondent, on November 30, 1976, discharged Asbury, Hale, Blankenship, Keller, and Rhoades because they engaged in protected concerted activity (attendance at any unemployment hearing), and thereby engaged in conduct violative of Section 8(a)(1) of the Act.[14]

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14. Cf. *E.H. Limited, d/b/a Earringhouse Imports*, 227 NLRB No. 118.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent discharged Virginia Asbury, Gerea Blankenship, Carolyn Hale, Nancy Keller, and Judy Rhoades in violation of Section 8(a)(1), of the Act, the Recommended Order will provide that the Respondent offer each reinstatement to each's job, and make each whole for loss of earnings or other benefits within the meaning and in accord with the Board's decisions in *F.W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended Order.

The General Counsel in his brief requests the Board to reexamine the amount of interest to be computed upon backpay awards and to change the rate of computation of interest on backpay from 6% to 9%. The Board's policy in interest was announced in *Isis Plumbing & Heating Co.*, 138 NLRB 716. Despite past requests for reexamination of the policy set forth in such case and the announcement

of new rates of interest on backpay, the Board has not changed its policy. I am bound by current Board policy and adhere to the standard remedy as set forth in *Isis*. I would suggest that this type of issue is one that the General Counsel could seek by applying to the Board for consideration under its rule making power rather than seeking the same through Administrative Law Judges who are bound by Board precedent.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that the Respondent cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Supreme Optical Company, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

Respondent, Supreme Optical Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or interfering, restraining, or coercing employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Virginia Asbury, Gerea Blankenship, Carolyn Hale, Nancy Keller, and Judy Rhoades immediate and full reinstatement to each's former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to each's seniority or other rights previously enjoyed, and make each whole for any loss of pay or other benefits suffered by reason of the interference, restraint and coercion against each in the

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15. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

manner described above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at Respondent's manufacturing facility at Franklin, Ohio, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. August 3, 1977

/s/ Jerry B. Stone
Jerry B. Stone
Administrative Law Judge

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16. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL offer to Virginia Asbury, Gerea Blankenship, Carolyn Hale, Nancy Keller, and Judy Rhoades immediate and full reinstatement to each's former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to each's seniority or other rights previously enjoyed, and make each whole for any loss of pay or other benefits suffered by reason of the discrimination against each.

WE WILL NOT discharge or interfere with, restrain, or coerce employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

Supreme Optical Company, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered,

defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street Federal Office Building Room 3003, Cincinnati Ohio 45202 Telephone No. (513) 684-3634

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-11023

SUPREME OPTICAL COMPANY, INC.

and

TEAMSTERS LOCAL UNION NO. 957, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

(Filed May 5, 1978)

On August 3, 1977, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions

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1. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's

(*Continued on following page*)

of the Administrative Law Judge, with additional rationale set forth below,[2] and to adopt his recommended Order, except that the remedy is modified so that the interest is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB No. 117 (1977).[3]

We agree with the Administrative Law Judge that the five employees were discharged for absence from the plant after they had received permission for such absence to engage in protected concerted activity. Thus, as more fully set out by the Administrative Law Judge, they had been granted permission by their immediate supervisor to attend a hearing before the Ohio Bureau of Unemployment Services upon request of a discharged employee that they testify on his behalf. After they had left the plant their departure came to the attention of the foreman and the general manager (Young); thereafter Young rescinded the permission and when the employees returned to the plant that afternoon they were terminated because they had attended the unemployment hearing.

The crux of this case is whether the employees were engaged in protected activities. While we agree with his conclusion and concur in all respects, we deem it necessary to explain more fully our reasons for so finding.

Footnote continued—

established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

2. Member Jenkins is satisfied with the rationale of the Administrative Law Judge's Decision and he adopts it in its entirety.

3. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The Respondent argues that employees who directly process claims against their employer or others under governmental insurance-type programs are not engaged in protected activity under Section 7 of the Act, referring to two Board decisions, discussed below, which it interprets as supporting this proposition. However, the cited decisions hold only that such action by one employee alone is not protected, and thus they have not been correctly interpreted. In *Hunt Tool Company,* 192 NLRB 145 (1971), the holding was that an action by a single employee in filing a law suit against his employer under the Federal workmen's compensation statute was not protected because it was not in conjunction with other employees and hence not "concerted." And in *Duqal, Ltd.,* 196 NLRB 511 (1972), the Board found a violation by discrimination against an employee based in part on the fact he engaged in union activities; the Board did not comment or rely on the Trial Examiner's holding that an individual employee's processing of a workmen's compensation claim was not protected concerted activity within the meaning of the Act. In any event, that case, unlike the present one, involved the processing of an action by one person, not in conjunction with any other employee, and hence the Trial Examiner's holding was like that in *Hunt Tool Company, supra,* which he relied on. Thus, the holdings related to individual action, not to the type of proceeding involved. In contrast, the issue here is solely related to the nature of the proceeding, i.e., whether clearly concerted action was protected where taken in support of a workmen's compensation claim by one dischargee.

It has long been recognized that this Board is required to administer the Act with careful accommodation to the statutory scheme as a whole.[4] It is equally well settled

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4. E.g., *Southern Steamship Company* v. *N.L.R.B.,* 316 U.S. 31, 47 (1942).

that the matter of unemployment compensation benefits arises out of the employment relationship, as pointed out by the Administrative Law Judge,[5] and is one aspect of the national labor policy.[6] And, contrary to the Respondent's contention, it is immaterial whether the subject of employee concerted activity is or is not directly related to their own conditions of employment *vis-a-vis* their own employer. For example, in cases too numerous to cite, it has been held by both the Board and the courts that a sympathy strike in support of employees of another employer is protected concerted activity. Similarly, the appearance of employee representatives before legislative committees has been held to be protected concerted activity.[7] And in a recent case somewhat analogous to the present one, the Board held, and the Court of Appeals for the Fifth Circuit affirmed, that distribution in nonwork areas of a union circular, which related in part to the union's opposition to a proposed state right-to-work law and its position on the then pending Minimum Wage Bill, was protected by the Act and the company's refusal to permit distribution in nonworking time and nonwork areas of the plant violated Section 8(a)(1) of the Act.[8]

Considering the situation here before us in light of the general principles and holdings of the many cases cited and referred to above, it is patent that the appearance of these employees at the unemployment compensation

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5. Cf. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

6. See "Labor Law, Cases, Materials, and Problems," 2nd Ed., by Bernard Meltzer 1977 at pp. 29 and 36 (1977).

7. *Bethlehem Shipbuilding Corporation Limited* v. *N.L.R.B.*, 114 F.2d 930, 937 (C.A. 1, 1940).

8. *Eastex, Inc.* v. *N.L.R.B.*, 550 F.2d 198, sec. II and cases cited in fn. 6 (C.A. 5, 1977), enfg. 215 NLRB 271 (1974), rehearing denied 556 F.2d 1280 (C.A. 5, 1977), cert. granted 98 S. Ct. 888, (January 23, 1978).

hearing—for which they had received permission in advance to leave work,[9]—was clearly a concerted activity which had some relationship to the employment situation and was protected by the Act. That this was so is even more apparent when it is recalled that the hearing concerned a termination by their own Employer and their testimony there might well have been in conflict with that which the Company presented.

As the Board has noted, "it is traditional for employees to help each other and make common cause so that 'each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping.' " *Washington Forge Inc.*, 188 NLRB 90, 97 (1971). While it is not likely that this would be literally true in the instant case, inasmuch as the one being helped was no longer an employee and hence could not be in a position to reciprocate to the five attending the hearing on his behalf, it is true that if these five supported the dischargee in this situation others would be more likely to come to their support in the event any of them were in a similar situation at any time in the future. There can be no doubt, however, that these individuals were engaged in concerted activity "for the purpose of . . . their mutual aid or protection" within the meaning of Section 7 of the Act.

In sum, it is clear, based on long-standing Board and court precedent, that the concerted activity involved herein was protected by Section 7 of the Act. Accordingly, we

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9. This is not to say that we would necessarily reach the same result if advance permission to be absent had not been sought and secured, since a balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required and the securing of permission is an important element in making the balance.

fully agree with, and adopt, the remedy recommended by the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that Respondent, Supreme Optical Company, Inc., Franklin, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C. May 5, 1978.

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
Betty Southard Murphy, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL offer to Virginia Asbury, Gerea Blankenship, Carolyn Hale, Nancy Keller, and Judy Rhoades immediate and full reinstatement to each's former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to each's seniority or other rights previously enjoyed, and make

each whole for any loss of pay or other benefits, plus interest, suffered by reason of the discrimination against each.

WE WILL NOT discharge or interfere with, restrain, or coerce employees in regard to hire or tenure of employment, or any term or condition of employment because of their protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accordance with Section 8(a)(3) of the Act.

Supreme Optical Company, Inc.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Federal Office Building, Room 3003, Cincinnati, Ohio 45202, Telephone 513-684-3634.

No. 78-1259

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SUPREME OPTICAL
COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD,

Respondent.

_____/

FILED
OCT 27 1980
JOHN P. HEHMAN, Clerk

O R D E R

Before: MARTIN and JONES, Circuit Judges; DUNCAN, District Judge.

On petition to review an Order of the National Labor Relations Board,

This cause came on to be heard on the record of proceedings before the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court

that the order of the National Labor Relations Board be and it is hereby enforced.

It is further ordered that Respondent recovers from Petitioner the costs on appeal as itemized below.

ENTERED BY ORDER OF THE COURT.

s/JOHN P. HEHMAN
Clerk

EXCERPT FROM TRANSCRIPT
OF HEARING BEFORE
ADMINISTRATIVE LAW JUDGE

Q. By which person were you discharged? A. I was discharged by Dan Knox.

Q. And after the interview or that discussion, did you ever have a conversation with Mr. Jenkins? A. Yes I did.

Q. What was the occasion? A. We were all in the office and I told Larry Jenkins at that time that we didn't have anything against the Company; that we only went to the Unemployment Office to try to help Dale get his unemployment to help his family.

Q. And what did he tell you? A. He didn't say anything.

CERTIFICATE OF SERVICE

I hereby certify that I have this 22 day of January, 1981, caused three copies of the foregoing Petition For a Writ of Certiorari to be served upon the following persons by depositing a copy of same in the United States mail, postage pre-paid:

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Deputy Associate General Counsel
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William J. Ford
Counsel of Record

No. 80-1262

FILED
APR 2 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUPREME OPTICAL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act by discharging five employees for attending an unemployment compensation hearing of a former employee where the employees had received permission from their supervisor before leaving the plant to attend the hearing.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) will be reported at 628 F. 2d 1262. It currently appears as an appendix to 633 F. 2d No. 3 (Jan. 19, 1981). The decision and order of the National Labor Relations Board (Pet. App. 27a-33a) and the opinion of the Administrative Law Judge (Pet. App. 4a-27a) are reported at 235 N.L.R.B. 1432.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on October 27, 1980. The petition for a writ of certiorari was filed on January 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 30, 1976, a hearing was scheduled before the Ohio Bureau of Unemployment Services to

determine whether Dale Priest, an employee who had been discharged by petitioner, would receive unemployment compensation benefits (Pet. App. 8a-9a). Priest requested five of petitioner's employees to attend the hearing and testify in his behalf (*id.* at 9a). Those five employees obtained permission to attend the hearing from a supervisor (*id.* at 11a); they told him that they would return after the hearing (*ibid.*).

The five employees proceeded to the site of the hearing and, after approximately an hour's delay, each of them testified (Pet. App. 13a-14a). Petitioner was represented at the hearing by its controller and a foreman, neither of whom spoke to any of the five employees (*id.* at 14a). After the hearing, the employees spoke with Priest for about 15 minutes, had lunch, and returned to the plant (*ibid.*). When they returned, they were told by the foreman and plant manager that they had been discharged for attending the hearing (*id.* at 17a).

2. Petitioner was charged with violating Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by "interfer[ing] with, restrain[ing] or coerc[ing] employees in the exercise of the rights guaranteed" by Section 7 of the Act, 29 U.S.C. 157. The Administrative Law Judge, after analyzing the testimony of those involved in the incident, found that a supervisor had indeed given the employees permission to attend the hearing (Pet. App. 6a-8a, 20a) and that petitioner's officials responsible for discharging the employees knew that permission was given (*id.* at 21a). He rejected as a pretext petitioner's assertion that the employees were discharged because their absence caused "production problems" (*ibid.*); he concluded that if petitioner had actually had such difficulties, the foreman who attended the unemployment compensation hearing "would have communicated such problem to the five employees at the time * * * and arrangements would have been made to minimize the time lost in attendance at the hearing" (*ibid.*). Conse-

quently, the Administrative Law Judge found, petitioner had discharged the five employees because they attended the hearing.

The Administrative Law Judge ruled (Pet. App. 19a) that the employees' attendance at the unemployment compensation hearing was "concerted activit[y] for the purpose of * * * mutual aid or protection" within Section 7 of the Act. He explained (*id.* at 19a n.13):

> If an employee is terminated or laid off, such employee is entitled to benefits * * * depending upon whether the termination or layoff is for cause or not. * * * A major protection for employees to see that their own unemployment benefits insurance is meaningful is the willingness of fellow employees to be available to testify as to the relevant issues. An employee who testifies for a discharged emp[illegible]yee as to such issues is in effect testifying in general support and protection of his or her own potential benefits and encouraging other employees to be potential witnesses.

Therefore, the Administrative Law Judge held, petitioner had violated Section 8(a)(1) of the Act (Pet. App. 20a). He ordered that the five employees be reinstated with back pay and that appropriate notices be posted (*id.* at 24a-25a).

The Board affirmed the findings and rulings of the Administrative Law Judge (Pet. App. 27a-28a). It specifically noted that it saw no basis for reversing his determinations on the credibility of witnesses (*id.* at 27a-28a & n.1). It emphasized that "the matter of unemployment compensation benefits arises out of the employment relationship * * * and is one aspect of the national labor policy" (*id.* at 30a). The Board cited its consistent position that " 'it is traditional for employees to help each other and make a common cause so that "each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping" ' " (*id.* at 31a, quoting *Washing-*

ton Forge Inc., 188 N.L.R.B. 90, 97 (1971)). Finally, the Board stressed that in this case the employees had sought and secured permission from petitioner. Otherwise, the Board said, it might not have reached the same result. "[A] balancing of the employee interest in protecting each other against the employer's interest in efficiently operating his business is required and the securing of permission is an important element in making the balance" (Pet. App. 31a n.9). The Board therefore agreed that petitioner had violated Section 8(a)(1), and it endorsed in substance the remedy ordered by the Administrative Law Judge (Pet. App. 32a-33a).

3. The court of appeals enforced the Board's decision. It found substantial evidence to support the Board's conclusion that the employees had been given permission to attend the hearing and that their absence placed "no burden upon [petitioner]" (Pet. App. 3a). The court agreed that in these circumstances—although not necessarily in every case (*id.* at 2a)—the employees' attending an unemployment compensation hearing was protected activity under Section 7. The court explained that "[t]he circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer. It is reasonable for employees to be concerned about the consequences of their possible termination" (*id.* at 2a-3a).

ARGUMENT

1. Determining whether an employer has violated Section 8(a)(1) often involves two distinct inquiries: whether the employees' activity was protected by Section 7, and whether the employer has "a countervailing interest that outweighs" the employees' rights. See, *e.g.*, *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 563 (1978). Here, as petitioner concedes, only the first inquiry is relevant. The Administrative Law Judge and the Board found both that petitioner gave the five employees permission to attend the hearing and that

petitioner's economic objection to their absence was a pretext. The court of appeals upheld these findings and petitioner does not ask this Court to overturn them.[1] These findings remove any basis for petitioner's asserting an economic interest in limiting the employees' activity. Thus this case does not present the question whether, and in what circumstances, an employer's economic interests might outweigh an employee's interests in attending an unemployment compensation hearing. Petitioner's position is simply that it is entitled under the Act to retaliate against an employee for testifying at an unemployment compensation hearing.

2. This Court has emphasized the deference that is to be given to the Board's definitions of the scope of employees' rights under Section 7. See, *e.g.*, *Eastex, supra*, 437 U.S. at 568-570; *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 266-267 (1975). The Board has determined that at least in certain circumstances, Section 7 protects employees who attend an unemployment compensation hearing for a former colleague. The only other court of appeals to have considered the issue agreed with the court below in upholding the Board's position. *NLRB* v. *Painter Tool, Inc.*, 103 L.R.R.M. 2603 (3d Cir. June 12, 1979), enforcing 235 N.L.R.B. 1468 (1978). The Board's position is, moreover, entirely consistent with the decisions of this Court.

a. Petitioner contends (Pet. 16-22) that attending the hearing was unrelated to the employees' "mutual aid or protection" because Priest was no longer an employee. Even if it is assumed that Priest was not an employee within

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[1] Petitioner accepts the finding that it gave the employees permission to attend the hearing (Pet. 5 n.3). While not expressly conceding that its economic rationale for dismissing the employees was a pretext (Pet. 7), petitioner gives no reason for this Court to overrule the finding below on that point and does not argue that its supposed economic justification outweighs the employees' interests.

the meaning of the Act, but see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 191-192 (1941), and that concerted activity to aid a former employee would not be protected by Section 7, but see *NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505 (2d Cir. 1942) (L. Hand, J.), petitioner's contention was fully answered by the Administrative Law Judge, the Board, and the court of appeals. As they explained (*e.g.*, Pet. App. 19a n.13, 31a, 2a-3a), by attending Priest's hearing the employees helped assure themselves of similar support from their fellow employees in the future. This Court has repeatedly endorsed the principle that Section 7 is intended to enable employees to promote and maintain "solidarity" of this sort. See, *e.g.*, *Weingarten, supra*, 420 U.S. at 260-261; *Houston Contractors Association* v. *NLRB*, 386 U.S. 664, 668-669 (1967).[2]

b. Petitioner also contends (Pet. 9-16) that the employees' attendance at the unemployment compensation hearing was insufficiently connected to their "interests as employees," *Eastex, supra*, 437 U.S. at 567, to be protected by Section 7. As the Administrative Law Judge (Pet. App. 19a

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[2]There is no merit to petitioner's assertion (*e.g.*, Pet. 12-18) that in this case the employees' statements established that their acts were unprotected. The statement of one employee to the effect that she "didn't have anything against" petitioner and wished only to help Priest's family, a statement which petitioner repeatedly cites (*e.g.*, Pet. 3 & n.1, 10, 15, 18, 24), was made in a discussion with supervisors shortly after the employees learned that they had been discharged for attending the hearing (Pet. App. 18a). Nothing requires employees seeking the protection of Section 7 to renounce all altruistic motives or to declare to their supervisors their antipathy for their employer. Moreover, the employee's statement is consistent with the desire to promote mutual solidarity, which the Administrative Law Judge (Pet. App. 19a n.13), the Board (*id.* at 29a-31a), and the court of appeals (*id.* at 2a-3a) agreed was the justification for the employees' action. In any event, this Court has repeatedly upheld the Board's authority to rule that particular activities are within Section 7 without ascertaining the motives of every employee who engages in those activities. See, *e.g.*, *Eastex, supra*, 437 U.S. at 569-570; *id.* at 565-566 & nn.15, 16 (collecting cases); *Weingarten, supra*, 420 U.S. at 260-261.

n.13), the Board (*id.* at 29a-31a), and the court of appeals (*id.* at 2a-3a) again explained,[3] if a discharged employee cannot obtain the testimony of other employees at an unemployment compensation hearing, the employer's account of the discharge will have a far greater effect on the employee's chances of receiving unemployment compensation benefits. As the Board pointed out (*id.* at 31a), this is especially true where, as here, the employer is represented at the unemployment compensation hearing. The Board, drawing on its "cumulative experience in dealing with labor-management relations" (*Weingarten, supra*, 420 U.S. at 266; see *Eastex, supra*, 437 U.S. at 569-570), concluded that this power in the hands of employers would affect the entire relationship between employers and employees (see Pet. App. 31a). Under *Eastex, supra*, 437 U.S. at 569-570, the Board's conclusion was plainly reasonable and the court of appeals did not err in upholding it.

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[3]Petitioner contends (Pet. 22-25) that under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court of appeals must be reversed because it enforced the Board's order on the basis of a different rationale from that used by the Board. The rationale attributed to the court of appeals by petitioner (Pet. 23) does no more than paraphrase the reasoning of the Administrative Law Judge (Pet. App. 19a n.13); this reasoning was adopted (*id.* at 27a) and reiterated (*id.* at 30a-31a) by the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1981

DOJ-1981-04